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CTEB & ANOR v. KETUA PENGARAH PENDAFTARAN NEGARA, MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
ZALEHA YUSOF JCA
B RHODZARIAH BUJANG JCA
[CIVIL APPEAL NO: W-01(IM)(NCVC)-360-10-2017]
14 FEBRUARY 2020

C ***CONSTITUTIONAL LAW:*** *Citizenship – Application – Illegitimate child – Child born to Malaysian father and non-citizen mother – Whether 'father' under s. 17 of Part III of Federal Constitution ('FC') refers to mother – Whether mother's non-citizenship impediment to application – Whether child lacked requisite qualification to acquire citizenship 'by operation of law' – Whether child born out of wedlock could be regarded as legitimate child for purpose of art. 14(1)(b) of FC*
D *once his parents marry each other after his birth – Whether s. 17 of Part III of Second Schedule of FC applicable – Whether child who obtained foreign citizenship deprived of Malaysian citizenship*

The first appellant was born in the Philippines on 27 September 2010, to a Malaysian father ('second appellant') and a Filipino mother. His parents only
E registered their marriage in Malaysia on 22 February 2011, making the first appellant an illegitimate child at the time of his birth. The appellants commenced originating summons at the High Court which, *inter alia*, sought a declaration that the first appellant was a Malaysian citizen pursuant to arts. 14(1)(b) or 15(2) of the Federal Constitution ('FC'). The High Court
F dismissed the originating summons. Hence, the present appeal which was confined to only art. 14(1)(b) of the FC. The questions that arose for adjudication were (i) could a child born out of wedlock be regarded as a legitimate child, for the purpose of art. 14(1)(b) of the FC, once his parents marry each other after he was born, hence s. 17 of Part III of the Second
G Schedule of the FC was not applicable; and (ii) whether a child who obtained a foreign citizenship is deprived of Malaysian citizenship. In support of their appeal, the appellants submitted: (i) the first appellant's status had been legitimated since his biological parents subsequently married; (ii) the first appellant was not illegitimate and reference to 'person's father' or 'parent',
H in s. 17 of Part III of the Second Schedule of the FC, was not to be construed as reference to his Filipino mother; (iii) the reference to s. 3 of the Legitimacy Act 1961 ('Act') should be retrospective and, once the marriage between the parents has been registered or solemnised, the person is granted the new status of being the legitimate child of their parents; and (iv) by virtue
I of the present tense used in s. 17 of Part III of the Second Schedule and since the first appellant's application for citizenship was made at the present time,

after the marriage of his parents, he would be entitled to claim his citizenship. The respondents, on the other hand, argued that (i) while it is true that an illegitimate child may be legitimated under s. 3 of the Act, the subsequent marriage of his parents would not change the birth status of the child; (ii) s. 4 of the Act deems the child as legitimate from the date of the marriage, hence the marriage did not have the effect of altering the child's birth status which was illegitimate; (iii) s. 9 of the Act only deems as if the child had been born illegitimate for the purpose of the rights and obligations of maintenance and support of himself, claim for damages, compensation, allowance and benefit or otherwise; and (iv) since the first appellant held a passport from the Philippines, he was barred from being granted a Malaysian citizenship.

Held (dismissing appeal):
Per Zaleha Yusof JCA delivering the judgment of the court:

(1) Article 14(1)(b) of the FC, which talks about citizenship by operation of law, needs to be read together with Part II and III of the Second Schedule of the FC. Reading these provisions, there will not be any problem if a child is born legitimate to a father who is a Malaysian citizen even if he was born outside the Federation. However, in the instant appeal, the child was born out of wedlock. He was illegitimate at the time of his birth. Section 17 of Part III of the Second Schedule specifically stipulates that 'father' in relation to a person who is illegitimate refers to his mother. The mother of the first appellant was a citizen of the Philippines. Hence, one of the qualifications of citizenship by operation of law that the father, in this case, the mother, was a Malaysian citizen at the time of the first appellant's birth, by plain reading of the provisions of the FC, had not been fulfilled. (paras 3-5)

(2) The wording of s. 1(b) of Part II of the Second Schedule is very clear. It talks about every person born outside the Federation 'whose father as at the time of the birth a citizen'. The emphasis was 'at the time of the child's birth'. The legitimacy of the child under ss. 3 and 4 of the Act could not be retrospective as s. 4 of the same clearly states that the child is rendered legitimate 'from the prescribed date or from the date of the marriage, whichever is the later'. It means the child is only deemed legitimate on the date of the marriage of his parents and not from the date of his birth. (para 10)

(3) Section 9 of the Act provides for personal rights and obligations of a legitimated person. However, it is only confined to maintenance and support, claim for damages, compensation, allowance and benefit. It does not include rights to citizenships. The Act is not competent, as a legal instrument, to confer citizenship status in view of unequivocal words of the FC, as the supreme law of the Federation. (para 11)

(4) Article 24 of the FC provides that voluntary acquisition of a person, of a foreign citizenship, would deprive him of his Malaysian citizenship. It also provides that any person who has voluntarily claimed and exercised rights accorded exclusively to the citizen of a foreign country may also be deprived of his citizenship. Article 24(3A) deems the exercise of a vote or the use of a passport issued by a foreign country, to be voluntarily claiming and exercising the rights of a foreign citizenship. Therefore, if a person uses a passport issued by a foreign authority as a travel document, the person shall be deemed to claim and exercise a right available under the law of that country, being a right accorded exclusively to the citizen of that country. Clause (3A), read together with cl. (2) of art. 24, will deprive that person of his citizenship. This was what happened here. The first appellant was indeed a citizen of a foreign country, the Philippines, and he had been issued with the Philippines' passport and had been using the said passport for traveling. By virtue of art. 24 of the FC, he was deprived of a Malaysian citizenship. (paras 15-18)

(5) The FC does not recognise dual citizenship. Although the FC was introduced on 31 August 1957, cl. (3A) of art. 24 only came into effect on October 1962, by virtue of the Constitution (Amendment) Act 14/1962. The amendment conveyed greater intolerance towards dual citizenship. The Government has a discretion to confer citizenship on a stateless child as the FC provides safeguard against statelessness, such as in art. 15A of the FC. However, the first appellant was not stateless. He was, undeniably, a citizen of the Philippines. (para 25)

Case(s) referred to:

Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia [2016] 1 CLJ 736 HC ***(refd)***

Foo Toon Aik v. Ketua Pendaftar Kelahiran Dan Kematian, Malaysia [2012] 4 CLJ 613 HC ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

Pendaftar Besar Kelahiran Dan Kematian, Malaysia v. Pang Wee See & Anor [2017] 7 CLJ 33 CA ***(refd)***

Legislation referred to:

Federal Constitution, arts. 14(1)(b), 15(2), 15A, 16, 16A, 17, 18, 19, 19A, 20, 21, 22, 23, 24(2), (3A), 25, 26, 26A, 26B, 27, 28, 28A, 29, 30, 30A, 30B, 31, Second Schedule Part II s. 1(b), Part III s. 17

Legitimacy Act 1961, ss. 3, 4, 9

For the appellant - M/s Francis Pereira & Shan
For the respondent - SFC

[Editor's note: For the High Court judgment, please see CTEB & Anor v. Ketua Pengarah Pendaftaran Negara & Ors [2018] 1 CLJ 671 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Zaleha Yusof JCA:

[1] The High Court at Kuala Lumpur had on 23 August 2017 dismissed the appellants' originating summons which *inter alia* sought for a declaration that the first appellant is a Malaysian citizen pursuant to art. 14(1)(b) or under art. 15(2) of the Federal Constitution (FC). Hence, the appeal before us by the appellants. However, before us, learned counsel for the appellants informed us that the appellants were not pursuing art. 15(2) but confined their appeal to only art. 14(1)(b) of the FC.

[2] The second appellant, a Malaysian at the time of the birth of the first appellant, is the biological father of the first appellant. The first appellant's mother is a citizen of the Republic of the Philippines. The first appellant was born on 27 September 2010 in the Philippines but his biological parents only legally registered their marriage in Malaysia on 22 February 2011. Hence the first appellant was an illegitimate child at the time of his birth.

Issues

(i) Can a child born out of wedlock be regarded as a legitimate child for the purpose of art. 14(1)(b) of the Federal Constitution, once his parents marry each other after he was born, hence s. 17 of Part III of the Second Schedule is not applicable.

(ii) Whether a child who has obtained a foreign citizenship is deprived of Malaysian citizenship.

Our Decision

[3] On the first issue, art. 14(1)(b) of the Federal Constitution talks about citizenship by operation of law. However, it needs to be read together with Part II and Part III of the Second Schedule of the FC. For ease of reference, we reproduce the relevant provisions as follows:

> Article 14(1)(b)
>
> Citizenship by operation of law
>
> 14(1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) …
>
> (b) **every person born** on or **after Malaysia Day, and having any of the qualifications specified** in **Part II** of the Second Schedule.
>
> **Section 1 of Part II of the Second Schedule:**
>
> 1. **Subject to the provisions of Part III** of this Constitution, the following persons born on or after Malaysia Day **are citizens by operation of law**, that is to say:
>
> (a) …..

A (b) **every person born outside the Federation** whose **father as at the time of the birth a citizen** and **either was born in the Federation** or is at the time of the birth in the service of the federation or of a State; and.

Section 17 of Part III of the Second Schedule

B Section 17 – For the purposes of Part III of this Constitution, **reference to a person's father or his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother**, and accordingly section 19 of this schedule shall not apply to such a person. (emphasis added)

C **[4]** Reading the above-cited provisions, we find there will not be any problem if a child is born legitimate to a father who is a Malaysian citizen even if he is born outside the Federation. But in the instant appeal, the child was born out of wedlock. He was illegitimate at the time of his birth. So there comes the problems. Section 17 of Part III of the Second Schedule D specifically stipulates that "father" in relation to a person who is illegitimate refers to his mother.

[5] As alluded to earlier, the mother of the first appellant is a citizen of the Republic of the Philippines. Hence one of the qualifications of the citizenship by operation of law that the father, in this case, the mother, is a E Malaysian citizen at the time of the first appellant's birth, by a plain reading of the provisions of the FC, has not been fulfilled.

[6] However, learned counsel for the appellants argued that the first appellant's status had been legitimated since his biological parents subsequently married. Hence the first appellant is not illegitimate and F reference to "person's father" or "parent" in s. 17 of Part III are not to be construed as reference to his Filipino mother. Learned counsel found support in the provision of ss. 3, 4 and 9 of the Legitimacy Act 1961 (LA 1961); which for ease of reference are reproduced below:

G Section 3

(1) Nothing in this Act shall operate to legitimate a person unless the marriage leading to the legitimation was solemnised and registered …

Section 4

Subject to section 3, where the parents of an illegitimate person marry or H have married one another, whether before or after the prescribed date, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Malaysia, render that person, if living, legitimate from the prescribed date or from the date or the marriage, whichever is the later.

I

Section 9

A legitimated person shall have the same rights and be under the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate, and subject to this Act the provisions of any written law relating to claims for damages, compensation, allowance, benefit or otherwise by or in respect of a legitimate child shall apply in like manner in the case of a legitimated person.

[7] Learned counsel for the appellants contended that the operation of s. 3 of the LA 1961 should be retrospective and once the marriage between the parents has been registered or solemnised, the person is granted the new status of being the legitimate child of their parents. He further contended that by virtue the present tense is used in s. 17 of Part III of the Second Schedule, and since the first appellant's application for his citizenship is made at the present time, after the marriage of his parents, therefore he would be entitled to claim his citizenship.

[8] The learned Senior Federal Counsel (SFC) for the respondent argued that while it is true that an illegitimate child may be legitimated under s. 3 of the LA 1961, the subsequent marriage of his parents would not change the birth status of the child. Section 4 of the LA 1961 deems the child as legitimate from the date of the marriage, hence the marriage does not have the effect of altering the child's birth status which is illegitimate. She further submitted that s. 9 of the LA 1961 only deems as if the illegitimate child had been born legitimate for the purpose of the rights and obligations of maintenance and support of himself, claims for damages, compensation, allowance, and benefit or otherwise. She found support in *Foo Toon Aik v. Ketua Pendaftar Kelahiran Dan Kematian, Malaysia* [2012] 4 CLJ 613; *Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia* [2016] 1 CLJ 736 and *Pendaftar Besar Kelahiran Dan Kematian, Malaysia v. Pang Wee See & Anor* [2017] 7 CLJ 33; [2017] 3 MLJ 308.

[9] We had perused the grounds of judgment of the learned High Court Judge. We found the submissions of the parties at the High Court were similar with the submissions before us. We found the learned High Court Judge's reasons in dismissing the originating summons were in line with the submissions put forward by the learned SFC. His Lordship had also referred to the same three cases referred to us by the learned SFC. His Lordship in para. [69] of the grounds of judgment concluded as follows:

…Thus, for purposes of Section 17 Part III of the Second Schedule of the Federal Constitution, P1's status is the status that obtained at the time of birth, which means that he was illegitimate at that time, and since his mother, Maylene was a non-citizen, he accordingly lacked the requisite qualification for purposes of acquiring citizenship "by operation of law" under art. 14(1)(b) of the Federal Constitution. This disposes off the main issue in this case.

[10] Having perused the grounds of judgment of the learned High Court Judge and considered the submission of the party before us, we found no reason to depart from the decision of the learned High Court Judge. With due respect to learned counsel for the appellants, we found the wording of s. 1(b) of Part II of the Second Schedule is very clear. It talks about every person born outside the Federation "whose father as at the time of the birth a citizen." The emphasis is "at the time of the child's birth." With due respect to learned counsel of the appellants, the legitimacy of the child under ss. 3 and 4 of the LA 1961 cannot be retrospective as s. 4 of the same clearly states that the child is rendered legitimate "from the prescribed date or from the date of the marriage, whichever is the later". It means the child is only deemed legitimate on the date of the marriage of his parents and not from the date of his birth.

[11] Section 9 of the LA 1961 provides for personal rights and obligations of a legitimated person. However, it only confines to maintenance and support, claim for damages, compensation, allowance and benefit. It does not include rights to citizenship. We agree with the learned SFC that the LA 1961 is not competent as a legal instrument to confer citizenship status in view of unequivocal words of the FC as the supreme law of the Federation. See the decision of this court in *Pang Wee See*'s case, *supra*.

[12] But that is not the only issue that concerns us. It was brought to our attention by the learned SFC during the hearing of the appeal that the first appellant has taken up Philippines' citizenship and that he has been issued with the Philippines passport. This fact was confirmed by learned counsel for the appellants. Hence comes the second issue.

[13] The learned SFC submitted that since the first appellant holds a Philippines passport, he is barred from being granted a Malaysian citizenship. Learned counsel for the appellants however argued, having been born outside the Federation, the first appellant had to travel back to Malaysia and as such had to naturally obtain the relevant travel documents in order for him to enter Malaysia legally with his Malaysian father. As such, the fact that the first appellant holds a Philippines passport cannot be a bar to his application pursuant to s. 1(b) Part II of the Second Schedule of the Federal Constitution.

[14] Deprivation of citizenship on acquisition of a foreign passport is clearly provided for under art. 24 of the FC. Article 24 of the FC provides as follows:

> 24. (1) If the Federal Government is satisfied that any citizen has acquired by registration naturalisation or other voluntary and formal act (other than marriage) the citizenship of any country outside the Federation, the Federal Government may by order deprive that person of this citizenship.

(2) If the Federal Government is satisfied that any citizen has voluntarily claimed and exercised in any country outside the Federation any rights available to him under the law of that country, being rights accorded exclusively to its citizens, the Federal Government may by order deprive that person of his citizenship.

(3) (Repealed)

(3A) Without prejudice to the generality of Clause (2), the exercise of a vote in any political election in a place outside the Federation shall be deemed to the voluntary claim and exercise of a right available under the law of that place; and for the purposes of Clause (2), a person who, after such date as the Yang di-Pertuan Agong may by order appoint* for the purpose of this Clause:

(a) Applies to the authorities of a place outside the Federation for the issue or renewal of a passport; or

(b) Uses a passport issued by such authorities as a travel document,

shall be deemed voluntarily to claim and exercise a right available under the law of that place, being a right accorded exclusively to the citizens of that place.

(4) If the Federal Government is satisfied that any woman who is a citizen by registration under Clause (1) of art. 15 has acquired the citizenship of any country outside the Federation by virtue of her marriage to a person who is not a citizen, the Federal Government may by order deprive her of her citizenship.

[15] What the article provides is that voluntarily acquisition of a person of a foreign citizenship will deprive him of his Malaysian citizenship. It also provides that any person who has voluntarily claimed and exercised any rights accorded exclusively to the citizen of a foreign country may also be deprived of his citizenship. Clause (3A) of art. 24 deems the exercise of a vote or the use of a passport issued by a foreign country, to be voluntarily claiming and exercising the rights of a foreign citizenship.

[16] Therefore, it is crystal clear that if a person uses a passport issued by a foreign authority as a travel document, the person shall be deemed to claim and exercise a right available under the law of that country, being a right accorded exclusively to the citizen of that country.

[17] This cl. (3A) read together with cl. (2) of art. 24 will deprive that person of his citizenship.

[18] This is what has happened here. The first appellant is indeed a citizen of a foreign country, the Philippines; and he has been issued with the Philippines passport, and has been using the said passport for travelling. He is therefore, by virtue of art. 24 of the FC, deprived of a Malaysian citizenship.

Conclusion

[19] It cannot be argued, our FC provides that children born overseas to a Malaysian father obtain citizenship through operation of law. If a child is born out of wedlock or prior to the marriage registration of his parents, the citizenship status of the child is determined by his mother's citizenship status. His mother's citizenship applies. It does not matter that the parents got married later. That is in our view irrelevant, as the cut-off date for determination is the date of his birth. That is the letter of the FC and being the supreme law of the Federation, no written law such as the LA 1961 can be used to interpret it otherwise.

[20] We agree with the learned SFC that the fundamental rule in interpreting the Constitution is to give effect to the intention of the framers. Such intention is gathered from the language of the provision. Reference is made to *NS Bindra* at p. 1266

> The fundamental principle of constitutional construction is to give effect to the intent of the framers of organic law and of the people adopting it. That is, 'according to the intent that made it'. Normally, such intent is gathered from the language of the provision. But if words used in the provision are imprecise, protean or evocative or can reasonably bear meaning more than one, then it is legitimate for the court to go beyond and call in aid other well-recognised canons of constructions.

[21] Applying the above principle, the court may only call in aid of other canons of construction to interpret words of Constitution that are imprecise, protean or evocative or can reasonably bear meaning more than one. But the court cannot interpret words that do not exist in the Constitution or insert new words into it.

[22] In *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187, at p. 190 [Raja Azlan Shah FJ (as His Highness then was)] had stated "the ultimate touchstone of constitutionality is the Constitution itself and not general principles outside it".

[23] Learned counsel for the appellants had referred to the United Nations Convention on the rights of children and urged us to read the FC in light of the other international laws which we are a party to. But here we are talking about the supreme law of the Federation. The constitutional regime and mechanism for acquisition of citizenship reside under Part III (arts. 14-31) of the Federal Constitution and they are not to be supplemented by other Parliamentary legislation or any international instruments.

[24] We therefore answer the first issue in the negative.

[25] The first appellant is undeniably a citizen of the Philippine. Our FC does not recognise dual citizenship. Although our FC was first introduced on 31 August 1957, cl. (3A) of art. 24 only came into effect on 1 October 1962 by virtue of the Constitution (Amendment) Act 14/1962. The amendment

conveyed greater intolerance towards dual citizenship. The Government has a discretion to confer citizenship on a stateless child, as the FC provides safeguard against statelessness such as in art. 15A of the FC. However the first appellant is not stateless. He is, at the risk of repeating, a citizenship of the Philippines.

[26] We therefore answer the second issue in the negative.

[27] Premised on all the above, we dismiss this appeal with no order as to costs.